STATE OF MICHIGAN

COURT OF APPEALS

LORETTA KAHL,

Plaintiff-Appellant,

V

BORMAN'S, INC.,

Defendant-Appellee.

UNPUBLISHED
April 6, 2006

No. 267267
Oakland Circuit Court
LC No. 2005-065314-CZ

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Because plaintiff failed to present evidence, direct or inferential, of defendant's knowledge of the condition and opportunity to take remedial action within a reasonable time, we affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff testified that she slipped on a whitish clear milky substance on the floor of defendant's store near a cooler at the end, between aisles seven and eight. A statement by one of defendant's employees (a cashier) indicates that, before plaintiff's fall, a customer informed the cashier of a spill in aisle six. The cashier inspected the spill and "found what appeared to be shampoo kinda drizzled down the aisle." She called for clean-up. The cashier believed that plaintiff fell about the same time that the clean-up on aisle six started, and that plaintiff fell in the same substance that was discovered in aisle six. The trial court granted defendant's motion for summary disposition, concluding that defendant did not have notice of the spill that caused plaintiff's fall.

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

A shopkeeper owes a duty to provide reasonably safe aisles for its customers. If the unsafe condition is not caused by the active negligence of the shopkeeper or his employees, liability depends on whether the condition was known to the shopkeeper or if it was "of such a character or has existed a sufficient length of time that he should have had knowledge of it." *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001) (citations and internal quotation

marks omitted). Notice may be inferred from evidence that the unsafe condition existed for a sufficient length of time that a reasonably prudent shopkeeper would have discovered it. *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979). Where there is no evidence to show that the condition existed for a considerable time, the trial court should grant judgment in favor of the shopkeeper. See *id*.

Plaintiff asserts that the evidence, viewed in the light most favorable to plaintiff, shows that the cashier had actual knowledge of "the condition" before plaintiff fell. Plaintiff's position seems to be that the "condition" is not simply "the drizzle" that the cashier observed in aisle six, but also the spill of the substance throughout the store. To impose liability on defendant, plaintiff was required to establish that defendant had notice of the hazard encountered by plaintiff, not merely knowledge of the possibility that a hazard may be present. The drizzle of shampoo in an aisle where it was not stocked may have indicated a leaking bottle and the possibility that the substance may have leaked in other areas. That may establish awareness of a *potential* for a hazard in another location. Although such knowledge may be relevant to constructive notice, it does not suffice as *actual* awareness of a hazard.

With respect to constructive notice, this case is comparable to *Whitmore, supra*. In that case, the plaintiff fell in an oily substance in the defendant's parking lot. She presented no evidence that the defendant's employees caused the condition or that they had actual notice of the condition. There was no evidence that the substance had been present for a considerable period of time. "Indeed, there is no evidence from which a jury could *infer* that the substance had been there for some time (*e.g.*, testimony that many cars appeared to have driven through the substance). . . . [T]he substance was indisputably present at the spot where plaintiff fell, but how and when it came there were matters of conjecture." *Id*., p 10.

Here, there was no evidence indicating how long the spill existed in the area that plaintiff fell. Plaintiff asserts that the spill in aisle six must have been present for an interval long enough for the cashier to inspect aisle six, call the bagger, and for him to begin the clean-up. However, there is no basis for inferring that the spill where plaintiff fell existed for the same period of time. At best, the cashier's statement provides a basis for inferring that the spill was caused by a shopper with a leaking bottle. But one could only speculate about the path and speed of that unknown shopper and when and where the leak began. There is nothing in the record to make it more or less probable that the shopper with the leaking bottle passed the area where plaintiff fell before or after visiting aisle six. The shopper may have passed the area that plaintiff fell only moments before. Plaintiff's attempt to show constructive notice is too speculative to create a genuine issue of material fact.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald S. Owens
/s/ Pat M. Donofrio